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PETITION FOR RECONSIDERATION
OF MEMORANDUM OPINION AND ORDER

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY	4
II. HEARING PROCEEDINGS	7
a. Hearing Designation Order	7
b. Petition for Reconsideration	7
c. Repeated Requests for Expedited Action	8
d. Memorandum Opinion and Order.....	9
III. ARGUMENT.....	9
a. The Commission's Failure to Consider the HDO Reconsideration was a Procedural Error Warranting Correction.....	10
b. New Information not Available at Time of the HDO Reconsideration Shows Enbridge is Using AMTS Spectrum for Public Safety-Related Purposes	11
c. Recent Congressional and Public Safety Developments Highlight Enbridge's Need for the AMTS spectrum.....	14
(i) Congressional Intention to Satisfy all Public Safety Needs	14
(ii) Lessons Of Hurricane Sandy	15
(iii) New Study On Health Effects of Emergency Situations	16
IV. Enbridge's Application Should be Treated Similarly to SCRRRA's and Removed from the Hearing.....	18
V. CONCLUSION.....	21

PETITION FOR RECONSIDERATION
OF MEMORANDUM OPINION AND ORDER

Enbridge Energy Company, Inc. (“Enbridge”), by its attorneys and pursuant to Section 1.106 of the rules and regulations (“Rules”) of the Federal Communications Commission (“Commission”),¹ hereby submits this Petition for Reconsideration (“MO&O Reconsideration”) of the Commission’s Memorandum Opinion and Order (“MO&O”)² in the captioned proceeding.

The Commission committed grievous procedural and substantive errors in the MO&O. The summary dismissal of Enbridge’s Petition for Reconsideration (“HDO Reconsideration”)³ of the Hearing Designation Order (“HDO”)⁴ was a clear violation of procedural requirements and well-established precedent. The Commission should correct its procedural error and formally consider Enbridge’s HDO Reconsideration in light of new facts and information occurring since Enbridge’s filing more than three years ago.

The Commission’s inexplicable conclusion that Enbridge’s use of these frequencies “primarily serve(s) the business needs of [Enbridge]”⁵ – and not public safety – is patently incorrect and must be reversed. Enbridge uses these frequencies to monitor and detect leakage of lethal gases in the workplace and around populated areas, for cybersecurity, and for other primary public safety purposes. Beyond any doubt, these frequencies do not primarily serve Enbridge’s business needs, as the Commission erroneously concluded.

¹ 47 C.F.R. § 1.106 (2013).

² *In re Maritime Communications/Land Mobile, LLC, Debtor-in-Possession Application to Assign Licenses to Choctaw Holdings, LLC*, Memorandum Opinion and Order, FCC 14-133 (rel. Sept. 11, 2014).

³ CII Companies’ *Petition for Reconsideration*, filed May 19, 2011 (EB Docket No. 11-71)(“*Petition for Reconsideration*”).

⁴ *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (rel. Apr. 19, 2011) (“*HDO*”).

⁵ MO&O at ¶36.

The Commission should take this opportunity to recognize the obvious public safety merits of Enbridge's request, remove the company's application from the hearing, and grant it after almost four years.⁶

I. INTRODUCTION AND SUMMARY

Enbridge is an indirect, wholly-owned subsidiary of Enbridge, Inc., which owns and operates the world's longest and most sophisticated oil and liquids transportation system. The company also has a significant and growing presence in the natural gas transmission and midstream business. Enbridge, Inc. indirectly owns and operates natural gas gathering, treating, processing, and transmissions facilities throughout the country, including Oklahoma, Texas, Louisiana, Mississippi, and Alabama. These systems gather natural gas from wellheads and treat and process the gas for delivery into intrastate or interstate pipelines for transmission to wholesale customers such as power plants, industrial customers, and local distribution companies.

In 2010, Enbridge entered into an arms-length agreement with Maritime Communications/Land Mobile's ("MCLM") to acquire a total of 27 Automated Maritime Telecommunications System ("AMTS") 12.5-kHz wide channel pairs in areas east of Dallas and north of Houston.⁷ On November 19, 2010, the companies filed an application to assign these frequencies from MCLM to Enbridge in this limited geographic area.⁸

⁶ Enbridge filed its application on November 19, 2010 (FCC File No. 0004430505)

⁷ See, Exhibit A for maps of Enbridge Service Territories.

⁸ See, FCC File No. 0004430505. Following the execution of the agreements and the filing of the assignment application, Maritime filed for bankruptcy in the Northern District of Mississippi. This agreement was approved by the Bankruptcy Court and the decision is on appeal to the federal district court. *Havens et. al v Maritime, U.S. District Court, Northern District of Mississippi, Aberdeen Division, Case No. 1-13-cv-00180* (lead case).

By May 19, 2011, the date of the HDO Reconsideration, Enbridge had spent more than \$150,000, to engineer and plan the deployment of its AMTS system to aid the company in complying with Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations. These regulations require Enbridge as the operator of a liquefied natural gas facility to have redundant forms of communication that are not interdependent.⁹

At the time, Enbridge planned to use the system to enable personnel in a control room to view pipeline data in real-time, adjust commodity flow, and promptly respond to warning signs indicating a potential emergency. This is not a simple "business application," as the Commission mistakenly concluded, but is directly related to public safety and responsive to statutory requirements. Moreover, the company's use of this system has evolved significantly in the intervening 3 ½ years and, as a result, is now even more demonstrably based on promoting the public's safety. This new information regarding the use of these frequencies fully warrants reconsideration by the Commission.¹⁰

As a procedural matter, the Commission's decision that Enbridge lacks standing to complain of being forced to participate in an FCC hearing is wrong as a matter of law. According to the MO&O, only those *excluded* from a hearing (not forcibly *included* in one) have been adversely affected and have standing to complain under the Rules. Not surprisingly, however, FCC precedent shows that being forced *into* a hearing is every bit as "adverse" as being kept *out* of it. Enbridge's HDO Reconsideration and later additional materials should now be fully considered by the Commission, not dismissed out of hand with accompanying dicta.

To date, Enbridge has invested nearly \$5 million in equipment and engineering support in designing and deploying a sophisticated, public-safety related network using these AMTS

⁹ 49 C.F.R. §193.2519. See also, *Petition for Reconsideration* at p. 14.

¹⁰ 47 C.F.R. §1.106.

frequencies. The system serves two essential public-safety purposes: (1) monitoring and detecting highly lethal gases, as required by Occupational Safety and Health Administration (“OSHA”);¹¹ and, (2) cybersecurity, which is closely linked to an Executive Order and corresponding recommendations by the National Institute of Standards and Technology (“NIST”).¹² The primary use of these frequencies east of Dallas and north of Houston is for these two critical public safety applications.

Enbridge also uses the AMTS frequencies for physical security to promote public safety, including video monitoring, snap shot cameras, motion sensors, intruder alerts, security gate access, and badge identification, as well as monitoring and controlling the multitude of valves and switches necessary to operate and maintain its pipelines in compliance with federal and state requirements. All of these functions are not merely business related but are essential to public safety.

The Commission’s summary dismissal of Enbridge’s HDO Reconsideration as primarily business (and not public-safety) related, is factually wrong and must be corrected. Enbridge’s AMTS system is essential to the safety of employees, contractors, and the public, and is necessary for the protection of property and preservation of the environment under circumstances where a failure in communications can have catastrophic consequences.

¹¹ See, <https://www.osha.gov/SLTC/hydrogensulfide/> (last visited Oct. 6, 2014).

¹² See, *NIST Framework for Improving Critical Infrastructure Cybersecurity*, Feb. 12, 2014, available at: <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf> (last visited Oct. 6, 2014).

II. HEARING PROCEEDINGS

a. Hearing Designation Order

On April 19, 2011, the Commission released the HDO designating for hearing certain issues regarding MCLM's qualifications to remain a Commission licensee.¹³ The pending applications filed by twelve critical infrastructure entities (four oil and gas companies, seven electric utilities, and one railroad) to acquire small portions of Maritime's spectrum in certain limited areas were swept into the hearing despite the fact that the HDO contained no allegations of wrongdoing against any of them.

In a footnote to the HDO, the Commission permitted only the railroad (the Southern California Regional Rail Authority or "SCRRA") to show why its application should be "removed from the ambit of the hearing proceeding and granted" due to the public safety implications of Positive Train Control ("PTC").¹⁴

b. Petition for Reconsideration

On May 19, 2011, nine of the critical infrastructure entities (the "CII Petitioners"), including Enbridge, filed the HDO Reconsideration supporting the removal of SCRRA from the hearing but questioning why the CII Petitioners' applications were treated differently.¹⁵ Enbridge and the other CII Petitioners argued that their requirements for this spectrum were as critical as SCRRA's, and they, too, should have the opportunity to remove their applications from the hearing. They pointed out that railroads, electric utilities, and oil and gas companies are all defined as Critical Infrastructure Industries under the Commission's rules and decisions; all require spectrum to comply with regulatory mandates; all would use the spectrum to support

¹³ HDO.

¹⁴ *Id* at fn 7.

¹⁵ *Petition for Reconsideration*.

critical and innovative new applications in the public interest; all face constraints in obtaining suitable spectrum; and all acted in good faith in their dealings with MCLM.

c. Repeated Requests for Expedited Action

Receiving no response to their HDO Reconsideration, Enbridge and the other CII Petitioners filed a Request for Expedited Action on July 15, 2011, urging grant of their applications and seeking clarity and guidance before making more substantial investments in deploying systems on the AMTS spectrum.¹⁶ Almost one year later, on June 27, 2012, they filed a Second Request for Expedited Action.¹⁷ On May 8, 2014, they sent a letter to the Chief, Wireless Telecommunications Bureau, again urgently requesting their HDO Reconsideration be granted.¹⁸ On June 20, 2014, they sent a letter to the Chairman yet again urgently requesting grant of the pending HDO Reconsideration.¹⁹

The Commission never responded to any of these requests. Over the intervening 3 ½ years, Enbridge continued investing in its AMTS network to support critical public safety initiatives.

Enbridge was not the only one concerned with the Commission's lack of action. At a prehearing conference, the Administrative Law Judge graphically acknowledged the applicants' frustration with the long delay in processing their applications but determined "his hands are tied" since only the Commission itself has the authority necessary to approve the applications outside the hearing.²⁰

¹⁶ *CII Companies' Request for Expedited Action*, filed July 15, 2011 (EB Docket No. 11-71).

¹⁷ *CII Companies' Request for Expedited Action*, filed June 27, 2012 (EB Docket No. 11-71).

¹⁸ *CII Companies' Letter to Roger Sherman*, filed May 8, 2014 (EB Docket No. 11-71).

¹⁹ *CII Companies' Letter to Chairman Tom Wheeler*, filed June 20, 2014 (EB Docket No. 11-71).

²⁰ "I'm trying to think if there is anything it's possible that I can do, and I'm, honestly, my hands are tied. And I know the frustration. I mean, I can't believe that what I'm hearing here is that you've got such public interests hanging around... I'm frustrated. I don't know what I would do if I were in your situation. I don't know what you

d. Memorandum Opinion and Order

On September 11, 2014, long after the CII Petitioners filed their HDO Reconsideration, the Commission released its MO&O summarily dismissing it on the grounds the HDO was an interlocutory ruling. Noting that the HDO did not limit the ability of the CII Petitioners to participate in the hearing, the Commission concluded they were not adversely affected by the ruling for purposes of requesting reconsideration of the HDO.²¹ According to the Commission, only those *excluded* from a hearing (not forcibly *included* in a hearing) have standing to complain. As discussed more fully below, however, under FCC precedent the HDO Reconsideration was not interlocutory in nature. The Commission should have addressed the merits of Enbridge's HDO Reconsideration rather than summarily dismissing it.

In dicta, the MO&O recognized the electric utilities and oil and gas companies "require spectrum to comply with regulatory mandates, would use the spectrum to support critical and innovative new applications in the public interest, face constraints in obtaining suitable spectrum, and acted in good faith in their dealings with MCLM,"²² but nevertheless denied their HDO Reconsideration and insisted again that only SCRRA's operations were sufficiently public-safety oriented as to qualify for removal from the MCLM hearing. Like SCRRA, however, Enbridge also primarily needs this spectrum primarily for public safety related purposes, including the prevention of human injury and protection of property.

III. ARGUMENT

The dismissal of the HDO Reconsideration was in violation of the Commission's procedural rules and well established precedent. It should be reinstated and formally considered

should do." See, Transcript of October 25, 2011, Hearing at p. 266 available at <http://apps.fcc.gov/ecfs/document/view?id=7021747027> (last visited Oct. 14, 2014).

²¹ MO&O at ¶35, citing Section 1.106(a)(1) of the Rules.

²² 47 C.F.R. §1.106(a)(1) (2013).

along with new information further demonstrating Enbridge's use of these frequencies is primarily public safety related. The loss of these channels – with no readily available replacements – would result in great and immediate risk to public safety.

a. The Commission's Failure to Consider the HDO Reconsideration was a Procedural Error Warranting Correction

Section 1.106 (a) (1) of the Commission's rules states that "[a] petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding."²³ Oddly, in the instant case, the Commission concluded that *forcing* a party to participate in the hearing (as opposed to *excluding* a party from a hearing) is not "an adverse ruling" since the party's ability to participate in the hearing is not limited. Of course, that conclusion is misplaced in this case, since the parties were not complaining that they had been denied the opportunity to participate in the hearing. Rather, the complaint was that they were being unfairly forced to participate in the hearing.

The Commission's decision not only ignores the plain meaning of an "adverse ruling" (since being required to do something one does not wish to do is easily deemed adverse) but is contrary to long established precedent. In *Western States Telephone Company et al.*, a party filed a petition for reconsideration of a designation order and sought to be removed from the hearing.²⁴ Citing to the same rule, Section 1.106 (a) (1), the Commission ruled: "[w]e will entertain the petition because it involves an alleged adverse ruling respecting petitioner's participation in the hearing. See, Section 1.106(a)(1) of the Rules."²⁵ This clear, unambiguous

²³ *Id.*

²⁴ *Western States Telephone Company et. al*, 66 FCC 2d 370 (1977).

²⁵ *Id.*, at ¶ 3.

conclusion by the Commission should come as no surprise, since being forced *into* a hearing is certainly as “adverse” as being kept *out* of it.²⁶

The Commission should reverse its procedural error and formally consider the HDO Reconsideration. In so doing, the Commission should take into consideration the new facts and information, detailed below, occurring after the initial filing that further establish the public-safety implications of Enbridge’s use of these frequencies and the clear public interest in removing Enbridge as a party and allowing it to prosecute its application outside the ambit of the hearing.²⁷

b. New Information not Available at Time of the HDO Reconsideration Shows Enbridge is Using AMTS Spectrum for Public Safety-Related Purposes

In the past three years, Enbridge has spent approximately \$4.4 million in purchasing and deploying equipment at remote sites to operate a sophisticated, public-safety related network to protect safety of life and preserve property along its pipeline system east of Dallas and north of Houston. This includes significant investments in purchasing and deploying master station equipment and executing several multi-year tower leases.²⁸

Enbridge’s two primary uses of these frequencies – sophisticated leak detection and cybersecurity – are recent developments. Enbridge would not have been able to operate such a robust, public safety system in 2011, at the time the HDO Reconsideration, nor was the Commission aware of it at the time of the MO&O. It has only become available as a new technology in the intervening years.

²⁶ The adversity of the party status ruling is highlighted by the fact that SCRRA is now free to prosecute its application on a “fast track” free of the hearing while the CII parties remain entrenched in an on-going complex hearing proceeding with no end in sight. Moreover, unlike the party removed the hearing, the parties forced to remain will have their assignment applications reviewed under a more stringent standard as these applications are tied to the character qualifications of MCLM.

²⁷ 47 CFR §§ 1.106 (c)(1) and (2).

²⁸ These costs do not include the expense of purchasing the spectrum from MCLM.

Safety of Life. Enbridge's AMTS network was deployed with the specific goal of promoting public safety. The network was designed to monitor hydrogen sulfide (H₂S) leaks along its pipeline system in and around high population centers like Houston and Dallas.

According to OSHA, H₂S is extremely flammable and highly toxic.²⁹ It is one of the leading causes of workplace gas inhalation deaths in the United States and, according to the Bureau of Labor Statistics ("BLS"), caused 60 worker deaths between 2001 and 2010.³⁰ OSHA notes that H₂S "can quickly, almost immediately, overcome unprepared workers, including rescue workers."³¹ OSHA has adopted stringent standards limiting potential exposure to the deadly gas at 20 parts per million ("ppm").³²

Enbridge's pipeline system can include hydrogen sulfide well in excess of 100 ppm. When an H₂S alarm is triggered by the system, workers are to immediately deploy safety masks carried in their work holsters. It is hard to imagine a more obvious public-safety related application than detecting lethal gases in a workplace that is located near high population centers.

Cybersecurity. Enbridge also is relying on its AMTS spectrum to deploy a robust network that meets President Obama's cybersecurity goals.³³ Consistent with the President's Executive Order 13636, the National Institute of Standards and Technology ("NIST") adopted a Framework in February 2014 to reduce cyber risks to critical infrastructure.³⁴ The Framework includes standards, methodologies, procedures, and processes to combat cyber risks. Though

²⁹ See, <https://www.osha.gov/SLTC/hydrogensulfide/> (last visited Oct. 14, 2014).

³⁰ *Id.*

³¹ *Id.*

³² See, 29 C.F.R. §1910.1000 (b)(2) and Table Z-2 (2013).

³³ *Improving Critical Infrastructure Cybersecurity*, Executive Order 13636 (Feb. 12, 2013)("Executive Order").

³⁴ See, *NIST Framework for Improving Critical Infrastructure Cybersecurity*, Feb. 12, 2014, available at: <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf> (last visited Oct. 14, 2014).

currently voluntary, NIST has stated that extensive adoption of this Framework by critical infrastructure entities is essential to achieving the goals of the Executive Order.

Enbridge is committed to meeting the President's cybersecurity goals and through the use of the AMTS frequencies has invested substantially in a robust cybersecurity system to protect against potential attacks. According to the text of the Executive Order, "repeated cyber intrusions into critical infrastructure demonstrate the need for improved cybersecurity. The cyber threat to critical infrastructure continues to grow and represents one of the most serious national security challenges we must confront."³⁵ Enterprise-owned radio networks like Enbridge's AMTS system can be made more secure and operate with higher availability than systems relying on existing commercial telecommunications infrastructure.

Enbridge has worked with third party consultants to design its AMTS network with an eye toward meeting President Obama's cybersecurity goals by maintaining network integrity and maximizing network reliability and availability. The integrity component aims to prevent the accidental or malicious modification of information transmitting over the network. Enbridge ensures the integrity of its network operating equipment with advanced confidentiality and non-repudiation mechanisms, encryption, authentication, firmware encryption, management safeguards, and other robust security features.

Without this spectrum, Enbridge is aware of no other dedicated frequency alternatives (and the Commission has pointed to none) to allow the company to design and operate a network with the integrity and availability necessary to meet the President's cybersecurity goals set forth by the Executive Order.

³⁵ Executive Order, p. 1

Other Public Safety Applications. The company also uses the AMTS channel bandwidths to support advanced digital monitoring and control of the pipeline, including safety of life applications like remote video monitoring of pipeline assets, motion sensors to alert personnel of physical intruders, and remote gate access to limit access to Enbridge's facilities. These types of applications protect workers, the public, and the environment. Contrary to the Commission's conclusion, they are not "primarily serv[ing] the business needs" of Enbridge.

The traditional Part 90 VHF and UHF channels do not provide sufficient bandwidth or geographic coverage to support Enbridge's operations. The propagation characteristics and ability to combine contiguous channels in the AMTS band make this spectrum uniquely suited for these types of public safety operations. Enbridge uses it to cover geographic areas where there is no other ubiquitous, reliable alternative, including in some cases cellular coverage, DSL, or even copper telephone lines. For safety purposes, Enbridge must own and operate its own system to ensure reliability and coverage for these public safety applications.

c. Recent Congressional and Public Safety Developments Highlight Enbridge's Need for the AMTS spectrum.

Legislation adopted since Enbridge filed its HDO Reconsideration, the subsequent lessons of Hurricane Sandy, and a recent study on the Health Effects of Emergency Situations, are just a few examples of developments highlighting the importance of reliable communications in the energy industry, supporting Enbridge's use of the AMTS frequencies for public safety purposes.

(i) Congressional Intention to Satisfy all Public Safety Needs

In 2012, Congress recognized the critical shortage of spectrum to meet the growing needs for public safety communications, including the public safety communications requirements of the nation's utilities. To address the existing deficiency in spectrum, Congress passed legislation

allocating 20 MHz of 700 MHz spectrum for public safety use under a single nationwide license.³⁶ The legislation recognizes the public safety requirements of CII entities and authorizes priority communications status on this network for utilities in meeting their public safety functions.³⁷ In furtherance of Congressional intent to meet these public safety requirements, FirstNet, the nationwide licensee, proposes to classify utilities as “public safety entities.”³⁸

While this legislation eventually may help to provide a long term solution to the spectrum shortage for some CII entities, it does little to meet their immediate need for spectrum necessary for the protection life and property. In the short term, this legislation demonstrates the clear intent of Congress to ensure adequate spectrum is available to support the nation’s public safety needs, including those of the nation’s critical infrastructure users.

Unfortunately, it is widely anticipated that the FirstNet 700 MHz Public Safety Broadband Network will not be available for public safety use for at least three to four years.³⁹ The spectrum shortage for CII entities is ongoing and any Commission action that creates uncertainty or otherwise disrupts existing public safety usage is contrary to the public interest and the intent of Congress.

(ii) Lessons Of Hurricane Sandy

The importance of using hardened internal communications systems for Enbridge and other CII entities to respond to life threatening situations is further highlighted by recent natural

³⁶ The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96, Title VI, 126 Stat. 256 (the “Spectrum Act”))

³⁷ Section 6001 (26) of the Spectrum Act, adopts an inclusive definition of public safety; See *79 Fed Reg 57058*, Sept. 24, 2014, at 57060-57062

³⁸ *79 Fed Reg 57058*, Sept. 24, 2014, at 57060-57062.

³⁹ FirstNet has only recently begun to the State consultation process as required by the legislation. In order to develop an operational plan FirstNet must first consult with each of 56 states and territories. This process is expected to take at least 18 months. In addition, FirstNet is required by the statute to release an RFP or RFPs for design of the network. This process could take approximately three to four years before vendors are selected.

disasters, such as Hurricane Sandy. In October 2012, Sandy “damaged hundreds of thousands of homes, forced tens of thousands of survivors into shelters and caused billions of dollars in damages.”⁴⁰ Damage occurred to “vital infrastructure systems including power transmission, transportation and water and sewage treatment facilities. As a direct result of the storm, 73 people lost their lives.”⁴¹

During this natural disaster, which impacted large population centers up and down the east coast, approximately 25 percent of cell towers were knocked out of service.⁴² This event demonstrates that when life-protecting emergency communications are most needed by CII entities, commercial networks alone cannot be relied upon. Without sufficient internal spectrum capacity during critical times of emergencies, CII entities will not be able to provide the vital services necessary to protect human life, preserve property, and restore service. Enbridge, like other utilities, requires direct control over its key communications systems.

Following Hurricane Sandy, President Obama called for utility workers to be treated as first responders during future emergencies.⁴³ The Commission cannot ignore the painful lessons of Sandy by denying Enbridge vital spectrum needed to protect safety of life and preserve property during times of emergency.

(iii) New Study On Health Effects of Emergency Situations

As the Commission knows, response time for CII entities is absolutely critical in an emergency situation. To shorten response times, sufficient communications capabilities are

⁴⁰ <http://www.fema.gov/sandy-recovery-office>. “About us the Sandy Recovery Office.” (last visited Oct. 14, 2014).

⁴¹ *Id.*

⁴² <http://www.usatoday.com/story/news/nation/2012/10/30/hurricane-sandy-wireless-cellphone-outage/1669921/>; *USA Today*, “FCC:25% of cell towers, broadband down in 10 states,” (last visited Oct. 14, 2014).

⁴³ <http://politicalticker.blogs.cnn.com/2013/05/08/president-electric-industry-plan-ways-to-restore-power/> CNN “President, electric industry plan ways to restore power.” (last visited Oct. 14, 2014).

essential. The longer an emergency persists, the greater the likelihood of loss of life from accidental causes as well as from non-accidental causes attributable to stress and other medical conditions. New health data supports the importance of efficient responses by utilities during emergencies, such as a power outage or lethal gas event.

A 2012 study by researchers from Yale and Johns Hopkins, demonstrates the relationship between power outages and mortality rates.⁴⁴ The study found that disease-related and accidental deaths both increased significantly during the largest blackout in U.S. history.⁴⁵ During the blackout, accidental deaths increased by 122% when compared to non-blackout periods. Disease-related deaths increased by 25%.

Usually, death tolls tallied from disasters include only accidents directly connected to the event.⁴⁶ However, as shown by this study, this approach greatly discounts the severe stress on health from emergency situations, such as blackouts and other potential natural or man-made disasters.⁴⁷

Lives clearly are at stake when the nation's critical infrastructure is compromised and commercial communications networks are inoperable. The Commission must take into account this newly emerging data linking disasters and the devastating impact on human life in evaluating Enbridge's critical public safety functions.

⁴⁴ G. Brooke Anderson and Michelle L. Bell, "Lights Out: Impact of the August 2003 Power Outage on Mortality in New York," *Toxicology* 23, no. 2 (2012): 1-5. (last visited Oct. 14, 2014).

⁴⁵ <https://environment.yale.edu/yer/article/the-true-cost-of-power-outages>: "The True Cost Of Power Outages" by Kathryn Siegel. August 2012, "Being afraid of the dark is apparently justified" Yale Environmental Review.

⁴⁶ *Id.*

⁴⁷ *Id.*

IV. Enbridge's Application Should be Treated Similarly to SCRRA's and Removed from the Hearing

SCRRA and Enbridge are both defined as critical infrastructure entities under the Commission's rules,⁴⁸ and both are using their AMTS frequencies for essential public-safety purposes. Having permitted SCRRA to remove itself from the hearing due to the public safety implications of its operations on these frequencies, the Commission must afford Enbridge the same opportunity.⁴⁹

The Commission is well aware "of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment."⁵⁰ Significantly, the Commission must "do more than enumerate factual differences, if any... it must explain the relevance of those differences to the purposes of the Federal Communications Act."⁵¹ In this instance, the Commission's analysis that SCRRA and Enbridge are not "similarly situated" is woefully flawed.

In its misguided attempt to distinguish between the two public safety services, both of which are intended to protect human life and preserve property, the Commission relied on the erroneous premise that "unlike PTC, those other services are not dedicated to communications to prevent human injury and property damage, but are also used for day-to-day facilities management and other purposes that primarily serve the business needs of the licensee."⁵² As demonstrated herein, however, the primary use of the spectrum by Enbridge is for leak detection,

⁴⁸ 47 C.F.R. §90.7 (2013).

⁴⁹ See, e.g., *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F. 2nd 730 (D.C. Cir. 1965); *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).¶

⁵⁰ *McElroy Elec. Corp.*, 990 F.2d at 1365.

⁵¹ *Melody Music Inc.*, 345 F.2d at 733.

⁵² *MO&O*, at ¶ 36.

cybersecurity, and other public safety purposes. Any “business” use is incidental, just as with PTC.

A report funded by the Federal Railroad Administration (“FRA”) documents the business applications incidental to PTC.⁵³ To quote, “[t]he Congress of the United States then directed FRA to conduct a separate evaluation of the business benefits of PTC. These are the savings railroads (and shippers) might expect to see if PTC is deployed on the U.S. railroad network.

Examples of potential business benefits include:

- line capacity enhancement
- improved service reliability
- faster over-the-road running times
- more efficient use of cars and locomotives (made possible by real-time location information)
- reduction in locomotive failures (due to availability of real-time diagnostics)
- larger “windows” for track maintenance (made possible by real-time location information)
- fuel savings”⁵⁴

It is not surprising, therefore, that both Enbridge and SCRRRA may expect incidental business benefits stemming from their primary public safety use of AMTS frequencies.

The Commission’s only other attempted justification for distinguishing the two public safety services – that SCRRRA has a statutory mandate to implement PTC – is equally flawed. Congress did not allocate or mandate the use of AMTS, 220 MHz, or any other specific spectrum for use by PTC. Nor is there is any indication Congress intended PTC to be implemented in preference to other vital public safety services that also play a critical role in protecting human life and preserving property in furtherance of statutory and regulatory requirements. Granting

⁵³ POSITIVE TRAIN CONTROL (PTC): CALCULATING BENEFITS AND COSTS OF A NEW RAILROAD CONTROL TECHNOLOGY by Randolph R. Resor, Vice President Costing and Economic Analysis, ZETA-TECH Associate Michael E. Smith, Senior Project Manager, Wilbur Smith Associates, Pradeep K. Patel, Project Manager, ZETA-TEC Associates, July 30, 2004.

⁵⁴ *Id.* at p.2

Enbridge's application, in fact, would not prejudice SCRRRA or any other public safety applicant in any way.

The Communications Act requires the Commission to make available a communications system "for the purpose of promoting safety of life and property."⁵⁵ Enbridge's use of this AMTS spectrum to detect leaks of lethal gas, support cybersecurity initiatives, and promote safety of life and protect property is entirely consistent with that statutory mission.

According to PHMSA statistics, between 1994 and 2013, there were 281 fatalities and 1,060 injuries attributed to serious incidents related to gas distribution.⁵⁶ An additional 41 fatalities and 195 injuries during that time period were attributed to gas transmission.⁵⁷ These statistics amply demonstrate that Enbridge's use of the AMTS spectrum is keenly related to the public's safety.

Accordingly, the Commission historically has treated railroads, utilities, and oil and gas companies equally with respect to the assignment of spectrum. In adopting rules implementing Sections 309(j) and 337 of the Communications Act, the Commission recognized that, "Congress deemed utilities, railroads, metropolitan transit systems, and pipelines to be entities that protect the safety of life, health, or property for purposes of public safety radio services."⁵⁸ When the Commission elevated SCRRRA's application above Enbridge's based on a statutory mandate for

⁵⁵ 47 U.S.C. §151.

⁵⁶ See, http://primis.phmsa.dot.gov/comm/reports/safety/serpsi.html?nocache=5339#_ngdistrib (last visited Oct. 14, 2014).

⁵⁷ See, http://primis.phmsa.dot.gov/comm/reports/safety/serpsi.html?nocache=5339#_ngtrans (last visited Oct. 14, 2014).

⁵⁸ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies: Establishment of Public Safety Radio Pool in the Private Mobile Frequencies Below 800 MHz*; Petition for Rulemaking of the Mobile Telecommunications Association, WT Docket No. 99-87, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22709, at ¶80 (2000).

PTC, the agency created a distinction where no substantive difference exists and arrived at a result not intended by Congress or justified under the Communications Act.

Enbridge's AMTS system is dedicated to leak detection, cybersecurity, and other communications to prevent human injury and property damage. Its application, like SCRRRA's, should be removed from the hearing and granted after pending before the Commission for almost four years.

V. CONCLUSION

As demonstrated above, the HDO was adverse to Enbridge. Under Commission precedent, Enbridge's HDO Reconsideration requesting that the company's application be removed from the hearing and granted was not interlocutory in nature. It should now be fully considered by the Commission in light of developments in the intervening years.

Enbridge needs these frequencies to monitor and detect leakage of lethal gases, for cybersecurity purposes, to protect workers, to guard against public disasters in populated areas, and to perform other critical, public-safety related operations. Beyond any doubt, these frequencies do not primarily serve Enbridge's business needs, as the Commission erroneously concluded.

The Commission should take this opportunity to correct its procedural error, recognize the obvious public-safety merits of Enbridge's request, and remove the company's application from the hearing and grant it after almost four years.

Respectfully submitted,

ENBRIDGE ENERGY COMPANY, INC.



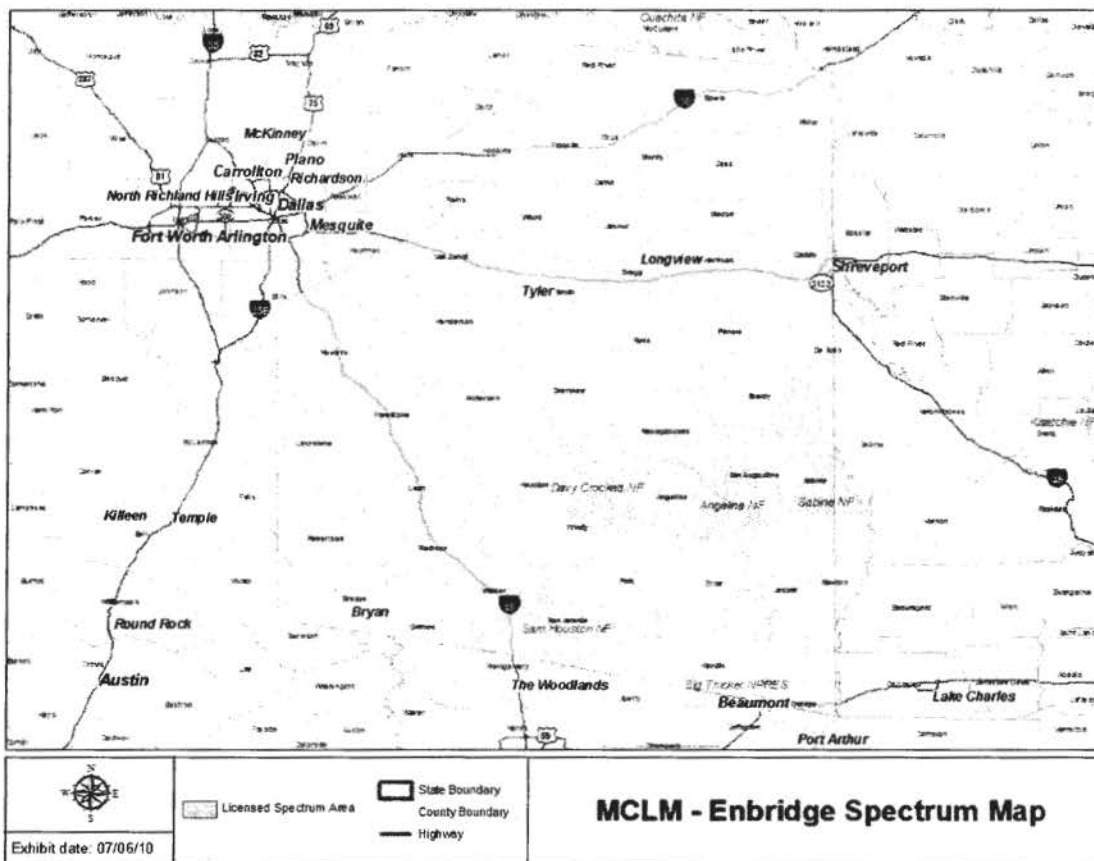
By: Jack Richards
Wesley K. Wright
Keller and Heckman LLP
1001 G St, NW, Suite 500W
Washington, D.C. 20001
(richards@khlaw.com; 202.434.4210)
Its Attorneys

October 14, 2014

Exhibits: "A" - Enbridge Service Territory
"B" - Affidavit of Joel Prochaska

Attachment: Certificate of Service

EXHIBIT A: ENBRIDGE SERVICE TERRITORY



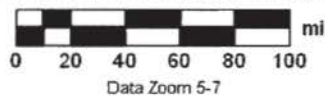


EXHIBIT B: AFFIDAVIT OF JOEL PROCHASKA

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
MARITIME COMMUNICATIONS/LAND	)	WT Docket No. 13-85
MOBILE, LLC, DEBTOR-IN-POSSESSION	)	FCC File No. 0005552500
Application to Assign Licenses to Choctaw)	
Holdings, LLC)	
)	
MARITIME COMMUNICATIONS/LAND	)	FCC File Nos. 0004153701 and
MOBILE, LLC, DEBTOR-IN-POSSESSION	)	0004144435
Applications to Modify and to Partially Assign)	
License for Station WQGF 318 to Southern)	
California Regional Rail Authority)	
)	
Application for New Automated Maritime	)	FCC File No. 0002303355
Telecommunications System Stations)	
)	
Order to Show Cause, Hearing Designation	)	EB Docket No. 11-71
Order, and Notice of Opportunity for Hearing	)	File No. EB-09-IH-1751
	)	FCC File Nos. 0004030479,
	)	0004193028, 0004193328, 0004354053,
	)	0004309872, 0004310060, 0004314903,
	)	0004315013, 0004430505, 0004417199,
	)	0004419431, 0004422320, 0004422329,
	)	0004507921, 0004153701, 0004526264,
	)	0004636537, and 0004604962

AFFIDAVIT OF JOEL PROCHASKA

I, Joel Prochaska, do state that:

- (1) I am the Manager of Operations Services for Enbridge, Inc. In this capacity, I manage and maintain the company's communications infrastructure and operations. I am responsible for designing and engineering the company's internal communications, deploying those systems in the field, and maintaining those operations.
- (2) I joined Enbridge in 2004 and have been in my current position since 2010.
- (3) I have reviewed and participated in the preparation of the Petition for Reconsideration of Memorandum Opinion and Order with which this Affidavit is associated ("Petition").